RED RIVER BASIN DRAINAGE CONFERENCE

PUBLIC DRAINAGE SYSTEMS:
DRAINAGE AUTHORITY RESPONSIBILITIES

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The Drainage Authority

"Drainage authority" means the board or joint county drainage authority having jurisdiction over a drainage system or project.

"Board" means the board of commissioners of the county, a joint county board, the board of managers of the watershed district that serves as the drainage authority where the drainage system or project is located.

Where it serves the purpose of watershed law, promotes the public welfare and is in the public interest, a watershed district shall take over a drainage system within the watershed district if directed by a county or joint county drainage authority.
Drainage Authority’s Role

The drainage authority “is in an appropriate position to assert the property owners’ drainage rights, since it is the only entity authorized to conduct work in the ditch.” *McLeod County v. MDNR*, 549 N.W.2d 630 (Minn. Ct. App. 1996).

When a drainage system is established, the drainage authority acquires jurisdiction over its constituent property, and landowners recovering damages or incurring assessments acquire property rights in the ditch system. *Fischer v. Town of Albin*, 258 Minn. 154, 156, 104 N.W.2d 32, 34 (Minn. 1960)
Drainage Benefits/Drainage Rights

- A landowner assessed for benefits in a public drainage system has a vested property right in the maintenance of the ditch in the same condition as it was then originally established. *Fischer v. Town of Albin*, 104 N.W.2d 32, 33 (Minn. 1960).

- The landowner is entitled to have all of the conditions upon which a drainage system is based, as well as the ditch itself, maintained so that the system will function substantially as established. *Id.* at 35.
Drainage Authority Responsibilities

Protect the drainage right
- Keep system in state of repair
- Prevent damage
- Prevent unauthorized use
- Ensure “fair share”

Balance interests
- Economic interests
- Environmental interests
After the construction of a drainage system has been completed, the drainage authority shall inspect and shall maintain the drainage system that is located in its jurisdiction and provide the repairs necessary to make the drainage system efficient.
Repair

Repair means to restore all or a part of a drainage system as nearly as practicable to the same hydraulic capacity as originally constructed and subsequently improved, including:

- resloping of ditches and leveling of waste banks to stabilize
- realignment to original construction to restore the effectiveness
- routine operations that may be required to remove obstructions
- incidental straightening and replacement of tiles
Repair of a drainage system may include the preservation, restoration, or enhancement of wetlands; wetland replacement under section 103G.222; the realignment of a drainage system to prevent drainage of a wetland; and the incorporation of measures to reduce channel erosion and otherwise protect or improve water quality.
Repair: Drainage Authority Duties

Drainage Authorities have an obligation to maintain ditches in a manner consistent with the policies established by the legislature in various environmental laws. McLeod County Ditch #8

Drainage authorities must balance its mandatory duties and obligations under the Drainage Code with the broader environmental policies of the State. McLeod County Ditch #8

Before performing any work, a Drainage Authority must give proper consideration to the conservation of natural resources (Minn. Stat. §103E.015)
Prevent damage

If a drainage system has been obstructed, including by the installation of bridges or culverts of insufficient hydraulic capacity, the board shall direct the responsible party to remove the obstruction or show why the obstruction should not be removed. Minn. Stat. §103E.075

A person may not cause or construct a drain that outlets into a drainage system without permission.

A person may not willfully obstruct or damage a drainage project or system.

Violation of this section is a misdemeanor. Minn. Stat. §103E.081
Unauthorized use

If the engineer determines or is made aware that property that was not assessed for benefits for construction of the drainage system has been drained into the drainage system or has otherwise benefited from the drainage system, the engineer shall identify the benefitting land. Minn. Stat. §103E.741, subd. 1.

The drainage authority shall appoint viewers as provided by section 103E.305 before the repair contract is awarded. The viewers shall determine the benefits to all property and entities benefited by the original construction of the drainage system and not assessed for benefits arising from its construction.
Unauthorized use

A public or private drainage system that drains property not assessed for benefits for the established drainage system may not be constructed to use the established drainage system as an outlet without obtaining express authority from the drainage authority. Minn. Stat. § 103E.401
Unauthorized use

The drainage authority shall consider the capacity of the outlet drainage system.

The drainage authority shall state the terms and conditions for use of the established drainage system as an outlet.

The drainage authority shall set the amount to be paid as an outlet fee.
Ensure Fair Share

If the drainage authority determines that the original benefits or damages determined in a drainage proceeding do not reflect reasonable present day land values or that the benefited or damaged areas have changed, the drainage authority may appoint three viewers to redetermine and report the benefits and damages and the benefited and damaged areas.
Balancing interests

Drainage Authorities have an obligation to administer ditches in a manner consistent with the policies established by the legislature in various environmental laws. McLeod County

The appellate courts will construe drainage laws liberally to promote the public health and the drainage and reclamation of wet or overflowed land.
Drainage Code Requirements

In any proceeding to establish a drainage project, or in the construction or repair of or other work affecting a public drainage system under any law, the drainage authority or other authority having jurisdiction over the proceeding must give proper consideration to conservation of soil, water, wetlands, forests, wild animals, and related natural resources, and to other public interests affected, together with other material matters as provided by law in determining whether the project will be of public utility, benefit, or welfare.
Environmental Policy: Chapter 116D

MEPA environmental review requirements (§ 116D.04 subd, 2a)

◦ Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed environmental impact statement prepared by the responsible governmental unit. *Minnesota Ctr. for Envtl. Advocacy v. Big Stone Cty. Bd. of Comm'rs*, 638 N.W.2d 198, 203 (Minn. Ct. App. 2002) (affirming district court reversal of MEPA negative declaration)

◦ *Coon Creek Watershed Dist. v. State Envtl. Quality Bd.*, 315 N.W.2d 604, 605 (Minn. 1982) (while the [drainage authority] is required to make necessary repairs, we disagree that the repair project is thereby exempt from the EPA. The requirement of an EIS does not preclude the repair but merely ensures that the environmental effects will be considered and that the repair will be done in the least harmful way”)
Environmental Policy: Chapter 116D

MEPA least impact requirement (§ 116D.04 subd. 6)
- No state action significantly affecting the quality of the environment shall be allowed, nor shall any permit for natural resources management and development be granted, where such action or permit has caused or is likely to cause pollution, impairment, or destruction of the air, water, land or other natural resources located within the state, so long as there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare and the state's paramount concern for the protection of its air, water, land and other natural resources from pollution, impairment, or destruction.
- Economic considerations alone shall not justify such conduct.
- The least impact requirement directly connects to the alternative consideration.
Slama vs. Pine County
(No. A07-1091, 2008 WL 1972914 (Minn. Ct. App. May 6, 2008))

Issue: May a landowner compel maintenance of a public drainage system to as constructed conditions

Ruling: The drainage authority may exercise its discretion in decide the scope of a repair

Remaining issues: At what point will a failure to act by the drainage authority create a compensable damage to the landowner
Drainage System Abandonment

If the drainage system does not serve any useful purpose to any affected property and is not of public benefit and utility, the drainage authority or court shall make findings and shall, by order, abandon the drainage system.

Abandonment may be partial (103E.806) or complete (103E.811).

Abandonment may only be accomplished by petition.

A petition must be signed by at least 51 percent of the property owners assessed for the construction of the drainage system or by the owners of not less than 51 percent of the area of the property assessed for the drainage system. (Complete)

an owner of benefited property may petition for partial abandonment.
De Facto Abandonment

The drainage authority must consider and weigh competing environmental and public interests in order to determine “whether [a] project will be of public utility, benefit, or welfare.” Minn. Stat. § 103E.015.

The drainage authority, has discretion to determine the manner in which the ditch will be maintained.

A lack of maintenance over time may limit the scope of future maintenance or prevent maintenance altogether.

Whether lack of maintenance can result in de facto abandonment or whether it simply results in a claim for damages is not addressed in statute and has not been addressed by the courts.
Managing funds

The board shall provide funds to pay the costs of drainage projects and systems.

The treasurer shall keep a separate account for each drainage system.

- The account must be credited with all money from assessments and other sources for the drainage system.
- The account must be debited with every item of expense made for the drainage system. Minn. Stat. §103E.651
Managing funds

Assessments:
Funds are generated for drainage system accounts by assessment to benefitted properties according to the benefits roll.

Bonding:
The drainage authority (County) may issue bonds to pay drainage system costs.

Borrowing:
If money is not available in the drainage system account on which the warrant is drawn, the board may, by unanimous resolution, transfer funds from any other drainage system account under its jurisdiction or from the county general revenue fund to the drainage system account.
Inspection Requirement

After the construction of a drainage system has been completed, the drainage authority shall . . . have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority.

Inspection shall include the permanent strips of perennial vegetation.

Open drainage ditches shall be inspected at a minimum of every five years when no grass strip violation is found and annually when a grass strip violation is found, until one year after the violation is corrected.
Drainage Inspector

In counties or watershed districts having public drainage systems, the drainage authority shall appoint a competent person as drainage inspector.

The inspector must not be a county commissioner.

The inspector may be the county highway engineer.

The inspector shall examine the drainage systems designated by the drainage authority.

The drainage authority shall specify the appointment period and compensation.
Inspections

Periodic/systematic
- On a set schedule
- Budgeted
- Specified criteria
- Allows for proactive maintenance

Reactive (not preferred)
- Complaint driven
- Compromises rights
Right of Entry

The engineer, the engineer's assistants, the viewers, and the viewers' assistants may enter any property to make a survey, locate a drain, examine the property, or estimate the benefits and damages. Minn. Stat. §103E.061

It is a good practice to notify landowners before lawful entry, to document the entry and conditions, to document any damage caused during entry and to seek the assistance of the Sherriff if a landowner objects to entry, interferes with entry or demands departure.
Right of Entry

The inspector’s right of entry is based on 103E.705 which states that “the drainage authority shall have the drainage system inspected on a regular basis by an inspection committee of the drainage authority or a drainage inspector appointed by the drainage authority.”

- This obligation is reinforced by the recent court of appeals case Blaine v. City of Sartell, 865 N.W.2d 723 (Minn. Ct. App. 2015), which states that the inspection requirement is statutorily mandated. In this case, the drainage authority has ongoing work to repair the drainage system. It would be a difficult argument that the inspector is not allowed to enter property to inspect the system – so long as that entry and inspection does not cause damage.

Moreover, to be guilty of a criminal trespass, a person must intentionally trespass (enter) on the premises of another and, without claim of right, refuse to depart from the premises on demand of the lawful possessor. Minn. Stat. §609.605, subd. 1(b)(3).
Inspection Policy

Drainage Authorities should have a written policy for inspecting public drainage systems, and the wording of the policy should be such as to establish a “regular basis” for inspections (it may provide for inspection at other times as well).

Drainage Authority may choose whatever frequency it deems appropriate (consistent with statute).

Drainage Authority, through its policy, should reference the relevant considerations (such as the weighing of cost, maintenance history, susceptibility of systems to blockage, etc.).
Funding Inspections

By ditch
From central fund
Basis of assessment
Right of Way

Drainage code procedures invoke eminent domain powers—when a new drainage project is established, the drainage authority acquires an easement for construction and future maintenance of the project.

Damages are awarded by the viewers for the area occupied by the project and for temporary damages for construction and future maintenance.

Engineer’s report should describe the easement area needed for construction and for future maintenance.

The easement area includes the area physically occupied by the drainage system along with the area impacted by construction, including areas cleared and grubbed of trees and the area over which the spoils were spread and leveled.
Right of Way

The Establishment Order carries with it certain secondary rights needed to enable the Drainage Authority to carry out its statutory functions. In Minnesota, these rights are be described as secondary easements.

Every easement includes the implied right to do whatever is reasonably necessary in order to fully enjoy the easement itself. This implicit right is termed a secondary easement.

Secondary easements are so necessary to the exercise of other interests in the property as to constitute an essential part or element of those other interests.

The scope of a secondary easement is limited by reasonableness. Reasonableness has been held to include ingress and egress and the maintenance of vegetation outside the physical footprint of the ditch or easement area.
Right of Way

Maintenance or repair of a drainage system does not usually involve an award of damages since a repair will not affect the land through which the ditch flows other than the damage occasioned by the original establishment of the ditch for which the landowners presumably were fully compensated at the time of establishment. Johnson v. Steele Cty., 240 Minn. 154, 158, 60 N.W.2d 32, 36 (1953).

Repair may include resloping ditches, incorporating multistage ditch cross-section, leveling spoil banks, installing erosion control, or removing trees. The drainage authority must appoint viewers to assess and report on damages and benefits if it determines that the resloping, incorporation of a multistage ditch cross-section, spoil bank leveling, installation of erosion control measures, or tree removal will require the taking of any property not contemplated and included in the proceeding for the establishment or subsequent improvement of the drainage system.
**NOTES:**

1) WORK LIMITS EXTEND FROM TOP OF BANK TO WORK LIMIT STAKES, ON THE DITCH SIDE NOTED IN THE PLANS.

2) ADDITIONAL AREA ALONG THE WORK LIMITS WILL BE UTILIZED FOR ADDITIONAL WORK LIMITS AND DISPOSAL OF CHIPS AND BRUSH WHERE APPROVED BY ENGINEER.

3) MATCH EXISTING OR EXCAVATE ACCORDING TO BOTTOM WIDTH TABLES

4) LEAVE SIDE INLET SWALE OR INSTALL SIDE INLET PIPE IN LOW AREAS TO PROVIDE DRAINAGE AND AS DIRECTED BY ENGINEER

**DITCH CORRIDOR "WORK LIMITS"**
NOT TO SCALE
Thank you!

Please feel free to contact Rinke Noonan if you need any additional information.

Attorneys Licensed in:
Minnesota, North Dakota, South Dakota, Iowa, & Wisconsin